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In the Supreme Court of the United States

OCTOBER TERM, 1975

POLISH AMERICAN CONGRESS
AND
THADDEUS L. KOWALSKI, PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. On August 10, 1972, the American Broadcasting Companies, Inc., network ("ABC") televised a comedy skit which contained jokes about Polish nationals (Pet. App. A1-A2). Petitioners, the chairman and members of the Anti-Defamation Commission of the Polish-American Congress, requested ABC to furnish time to reply to the telecast. ABC denied the request, but expressed regret that petitioners were offended by the telecast (*id.* at A2-A3).

Petitioners then filed a complaint with the Federal Communications Commission in which they alleged that the telecast constituted a demeaning and defamatory attack upon Polish nationals and Polish Americans in the guise of ethnic humor and, as such, was a controversial issue of public importance, and that ABC's denial

of their request to reply to the August 10 telecast violated the Commission's fairness doctrine and personal attack rule. Petitioners requested that the Commission rule that petitioners were entitled to equal time or a reasonable opportunity to respond to the August 10 telecast (Pet. App. A1, A3).

The Commission's Broadcast Bureau denied relief on the ground that ABC's decision that the telecast did not involve a controversial issue of public importance was neither unreasonable nor made in bad faith (Pet. App. A15-A18). The Commission upheld the Bureau's ruling (Pet. App. A19-A21).

The court of appeals affirmed (Pet App. A1-A14). The court first noted that the fairness doctrine and the personal attack rule apply only when a controversial issue of public importance is discussed, and that therefore the issue before it was whether the Commission "properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable nor in bad faith" (Pet. App. A7). The court then concluded that petitioners had failed to introduce any evidence which indicated that ABC's judgment was either unreasonable or made in bad faith (*id.* at A8).[1]

2. The fairness doctrine requires that radio and television broadcasters afford reasonable opportunity for the discussion of contrasting views on controversial issues of public importance. *In the Matter of Obligations of Broad-*

[1]The Bureau had found that even if a controversial issue of public importance had been discussed, the jokes at issue would not constitute a "personal attack" since they did not reflect upon the "'honesty, character, integrity or like personal qualities' of a person or group," as the rule contemplated (Pet. App. A18). Because of its ruling that the challenged program did not discuss a controversial issue of public importance, the court of appeals did not reach this alternate basis of the Commission's dismissal of petitioners' complaint (Pet. App. A8, n. 5).

cast Licensees Under the Fairness Doctrine, 23 F.C.C. 2d 27, 28. The rule on personal attacks requires that broadcasters provide a personal right of response to the person or group whose "honesty, character, integrity or like personal qualities" are impugned "during the presentation of views on a controversial issue of public importance." 47 C.F.R. 73.679.

As this Court noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111, since such requests for time under the fairness doctrine and personal attack rule require the resolution of many difficult factual issues, "[t]he broadcaster * * * is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations" within guidelines prescribed by the Commission. Moreover, to lessen the danger of governmental intrusion into areas of First Amendment concern, the Commission has refrained from substituting its judgment for that of the licensee, and has limited its function to determining "whether the licensee can be said to have acted reasonably and in good faith." *Applicability of the Fairness Doctrine*, 29 Fed. Reg. 10415, 10416, 40 F.C.C. 598, 599; *Fairness Report*, 48 F.C.C. 2d 1. The courts have upheld this allocation of responsibilities. See, *e.g.*, *Democratic National Committee* v. *Federal Communications Commission*, 460 F. 2d 891, 900 (C.A.D.C.), certiorari denied, 409 U.S. 843; *Columbia Broadcasting System*, *supra*, 412 U.S. at 118-119, 124, 127, 131; *Democratic National Committee*, *supra*, 460 F. 2d at 900-903.[2]

In the instant case, the Commission correctly determined that ABC had acted reasonably and in good faith

[2]See also *Larus & Brother Co.* v. *Federal Communications Commission*, 447 F.2d 876 (C.A. 4); *Green* v. *Federal Communications Commission*, 447 F.2d 323, 329-330 (C.A. D.C.); *Neckritz* v. *Federal Communications Commission*, 446 F.2d 501, 502 (C.A. 9); *Applicability of the Fairness Doctrine*, *supra*, 40 F.C.C. at 599.

in deciding that the August 10 broadcast raised no controversial issue of public importance. Petitioners presented no evidence that either the status of Polish nationals and Polish-Americans or jokes concerning such groups was a controversial issue of public importance. The fact that many Polish nationals or Americans of Polish descent find such jokes offensive does not itself make their broadcast a controversial issue of public importance. Cf. *Healey* v. *Federal Communications Commission*, 460 F. 2d 917, 922 (C.A.D.C.).

Television Station WCBS-TV, 8 F.C.C. 2d 381, petition for reconsideration denied, 9 F.C.C. 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842, upon which petitioners primarily rely, is inapposite. There, on the basis of overwhelming evidence that cigarette smoking endangered public health, the Commission found that cigarette advertising constituted a controversial issue of public importance, and that therefore broadcasters must provide substantial time for the presentation of contrary views. Petitioners did not make a comparable showing that broadcasting of jokes concerning Polish nationals constitutes such an issue.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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